

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

625 Indiana Avenue, N.W. Suite 900

Washington, DC 20004

Lucious Wright,

Appellant

v.

ROBERT A. MCDONALD,

Appellee

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Case No. 15-3603

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

1. Whether the Board of Veterans' Appeals (hereinafter, the Board) erred in its assessment of the medical evidence of record.
2. Whether the Board made a finding of material fact that is clearly erroneous.
3. Whether the Board relied on its own, unsubstantiated medical opinion in arriving at its decision.

STATEMENT OF THE CASE

Appellant served on active duty from January 1966 to January 1968. (R. at 3). His application for service connection for his neck and low back conditions was denied in a June 2007 rating decision (RD), and a VA Form 9 was timely filed in August 2008. A hearing was held in May 2015 (R. at 23), and in its decision dated July 27, 2015 (R. at 1), the Board denied the Appellant's claim for service connection in respect of both disabilities. Appellant timely filed a Notice of Appeal with the Court and the matter is pending consideration.

SUMMARY OF THE ARGUMENTS

In its July 27, 2015 decision, the Board found that the Appellant's degenerative joint disease (DJD) and degenerative disc disease (DDD) of the cervical spine, and the DDD of the lumbar spine did not have an onset during active duty service, nor were they shown to be otherwise etiologically related to an in-service injury, disease or event. (R. at 4). The Board therefore concluded that the criteria to

establish entitlement to service connection for both these conditions had not been met. (R. at 5).

Appellant submits that he has clearly met the criteria for service connection for both conditions pursuant to the Regulations and case law. Appellant further submits that the Board has (1) erred in its assessment of the medical evidence, (2) made findings of facts that are clearly erroneous, and (3) relied on its own, unsubstantiated medical opinion to deny service connection.

The general rule regarding entitlement to service connection is that the evidence must show (1) the existence of a present disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *Caluza v. Brown*, 7 Vet. App. 498,505 (1995). The most acceptable way of satisfying the above three requirements, is to provide: (1) medical evidence of a current disability; (2) lay or medical evidence of an in-service incurrence of a disease, injury, or event; and (3) medical evidence that links the current disability to the precipitating disease, injury, or event in service. *Epps v. Gober*, 126 F. 3d 1464 (Fed. Cir. 1997).

In the arguments which follow, Appellant will demonstrate that he has met the criteria for service connection for his cervical and lumbar spine conditions, and

that the Board's denial of his claims is not substantiated by the evidence of record nor by the regulations and case law.

ARGUMENTS

A. JURISDICTION

38 USCS § 7252 gives the Court of Appeals for Veterans Claims (hereinafter, the Court) exclusive jurisdiction to review decisions of the Board, and it empowers the Court to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriately." 38 USCS § 7252(a).

B. ENTITLEMENT TO SERVICE CONNECTION

Appellant claims service connection on a direct basis - *Epps v. Gober*, 126 F. 3d 1464 (Fed. Cir. 1997) - and asserts the criteria enunciated therein have been clearly met.

(i) There is Medical Evidence of a Current Disability

Appellant has formal diagnoses of degenerative joint disease and degenerative disc disease of the cervical spine (R. at 100), and degenerative disc disease of the lumbar spine (R. at 108).

(ii) There is Lay or Medical Evidence of an In-Service Incurrence of a Disease, Injury or Event

Appellant has testified that his current neck and low back disabilities were caused as a result of an in-service jeep accident wherein he hurt his head, back and neck.

(R. at 8; R. at 27). The Veterans Law Judge noted that Appellant's wife, daughter, son, sister and grand daughter provided lay statements indicating they personally witnessed Appellant complaining of chronic neck and low back pain which he informed them resulted from his in-service accident. (R. at 8). The Board has accepted the Appellant's account of the injury in service as credible. (R. at 11). If, therefore, Appellant's "service treatment records did not reflect any complaints, treatment, or diagnosis for any neck or back related problems", (R. at 8) his lay statements (deemed credible by the Board), and corroborated by family members must be deemed credible evidence of an in-service incurrence of a disease, injury or event. At the Board's hearing, Appellant testified under oath, that on his return to the field after the accident, he reported the said accident to the mess sergeant who "probably didn't report it." (R. at 28). Appellant testified further that throughout the balance of his military service he suffered from back and neck problems which he complained of to the mess sergeant about. (*Id.*). Appellant was able to perform his duty as first cook because he did not "have to lift or do anything. (*Id.*). This is the reason why, Appellant assumes, the complaints of his back and neck conditions were not recorded in his military service records. (*Id.*). In such a situation, where the incurrence of an injury is not of medical record, but the incident is conceded by the VA, a medical opinion is necessary to establish service connection.

(iii) *There is Medical Evidence Linking Appellant's Current Disabilities to the Precipitating Injury or Event In Service*

Appellant medical record is replete with physicians' reports and opinions linking his current neck and back disabilities to his in-service accident. Yet the Board, without adequate reasons or bases, failed to attribute to these opinions, the requisite probative value in order to find the Appellant service connected.

For example, one of Appellant's treating physicians, Dr. Kennedy Ganti (Dr. K.G.), consistently linked his cervical and lumbar spine conditions to his in-service injury. See reports of February 2008, June 2008, February 2010, May 2010 and October 2011, which the Board noted as supportive of a nexus. (R. at 9). In June 2013, Dr. K.G. again submitted another opinion stating that he believed Appellant's extensive cervical and lumbar disc disease with canal and foraminal stenoses at multiple levels, were service related. Despite supportive opinions of Dr. D.K., who had treated Appellant for a number of years, the Board gave deference to a May 2014 report of a VA Orthopedic Examiner who, "based on a review of the veteran's medical records and his lay statements about his claimed in-service accident" (R. at 10), found that it was "less likely than not that the alleged jeep accident resulted in neck and low back injuries." (R. at 10-11). As a reason for his finding, the VA examiner "found significant that the Veteran's injuries, by his own report, were not severe enough that he was unable to resume

his regular duties immediately following the accident”; and that there was “no evidence of an injury sufficiently severe to cause his currently diagnosed cervical and lumbar spine disabilities.” (R. at 10). Appellant asserts that this reasoning is neither factually nor medically sound because (1) the fact that Appellant was able to return to work after his accident (in obedience to his Mess Sergeant’s orders) is not conclusive evidence that Appellant’s injury was not severe, or that the effect of the injury could not have progressed into the conditions with which Appellant is currently diagnosed; and (2) the absence in the records of a sufficiently severe injury” does not prevent the injury from developing into degenerative joint and degenerative disc diseases.

Appellant is aware of no medical treatise indicating that DJD or DDD, which progresses over time, must be derived from a severely incurred injury, to the degree intimated by the VA. In fact, Dr. D.K., and at least two other doctors opined that the in-service accident was the direct cause of Appellant’s current diagnoses. *The VA examiner is the only medical personnel who found otherwise.*

On May 7, 2012, Neurologist, Dr. S. Manzoor Abidi (Dr. S.M.A.), had a consultation with Appellant at the request of Dr. K.G. (R. at 251). Upon interviewing and examining Appellant, Dr. S.M.A. noted that Appellant had a long standing history of injury to his neck dating back to 1966 when he had a jeep accident in service. (R. at 253). Dr. S.M.A. opined: “I feel that his symptoms are

due to cervical spondylosis and radiculopathy and secondary headaches which are directly relating to this trauma of 1966. His low back pain may also relate to the same injury of 1966 but I recommend orthopedic evaluation of his low back pain while I will address his headaches and neck pain.” (R. at 253). Dr. S.M.A. ordered an x-ray of the cervical spine and an MRI of the brain “to rule out structural pathology.” (*Ibid*). Upon completion and review of these objective tests, Dr. S.M.A. opined in his report of June 14, 2012, that the cervical spine condition as well as the headaches were “directly related to the injuries sustained by Mr. Wright ... when he was in active duty.” [R. at 9; R. at 256]. Dr. S.M.A. has therefore provided adequate basis for his nexus opinion.

The relationship between Appellant’s military service and the current diagnosis for his back condition, already established by Dr. K.G., was confirmed by Dr. Batool Razvi, who assumed care of Appellant from his colleague Dr. K.G., in his July 2015 and February 2015 reports. [R. at 10]. On February 10, 2015, Dr. K.G. stated as follows:

“... I am writing to update you as to the status of his chronic back pain sustained after a vehicle accident while in the military. It was found that patient has extensive cervical disc and lumbar disc disease with canal and foraminal stenosis at multiple levels, which has led to chronic neck and back pain that he still has on a daily basis. ... We believe the injury is service related and should be factored into Lucious’ overall disability assignment by the Veterans Administration.” (R. at 48).

Both doctors have provided sound bases for their opinions. Their opinions should accordingly be given significant weight.

The Board has also based its denial on the VA Examiner's finding of inconsistency in the opinions of Dr. D.K. and the statements of the Appellant. However, the examiner failed to prove such inconsistencies. By way of an explanation, the Board referenced the VA examiner's noting Dr. K.G.'s statement that the Appellant's disabilities "stemmed from his years of military service", whereas Appellant stated, during his VA examination, "that his current neck and low back disabilities occurred as a result of one jeep accident during service." (R. at 10). Clearly, there is no inconsistency with these two statements. Dr. D.K. stated his injuries stemmed from Appellant's years of military service. Appellant served two years in active service. While citing the jeep accident during service as the cause of his spinal injuries, Appellant also testified that after the accident he continued to suffer from, and to complain of back and neck pain, while still in the military. These two statements are reconcilable and are in no way inconsistent. Yet, because of this finding of inconsistency by the VA examiner, the Board agreed with the examiner that the opinions of Dr. D.K. were not persuasive. (R. at 10 – 11). In that regard, Appellant finds that the Board erroneously set aside competent medical evidence, and relied on its own unsubstantiated medical opinion to deny service connection for Appellant's neck and back disabilities.

While admitting that the private medical opinions were supportive of the Appellant's claim, the Board nonetheless found them to be without basis (citing *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). (R. at 13). The Board also found these opinions to be of little probative value because they were based on Appellant's own account of his injuries and on the fact that Appellant was able to return to work after his injuries. (R. at 13). Accordingly, the Board found the May 2014 VA opinion more probative. This is clearly erroneous, because, the Board may not reject or disregard the medical opinion of a private physician (here, more than one) simply because it is based on information given by the veteran (*Kowalski v. Nicholson*, 19 Vet. App. 171, 177 (2005)), unless the veteran is found to be not credible. *Curry v. Brown*, 7 Vet. App. 59, 68 (1995); *Owens v. Brown*, 7 Vet. App. 429, 433 (1995). The requirement to give reasons and bases compels the Board to explain whether it concluded that the veteran's statements to the doctor were not credible, and if so, why it reached this conclusion. Appellant's account of the in-service jeep accident and accompanying pain, which he gave to his private physicians, is the same that he gave to the VA examiner. Significantly, the Board found the Appellant credible, when it stated as follows: **"The Board find that the Veteran's statements describing his in-service jeep accident are competent and credible as the records includes no contrary evidence. See *Layno v. Brown*, 6 Vet. App. 465, 470 (1994).**

Furthermore, the Veteran admits that he did not seek treatment for any neck or low back pain at the time of the accident or during the rest of his service and continued his duties as a cook.” (R. at 11). Hence, the Board’s rejection of the private physician’s medical opinion on the ground that it was based on Appellant’s own account of his injuries, is clearly erroneous.

The Board also cited *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) to justify its rejection of private medical opinions (which it deemed inadequate) on the basis of an inaccurate factual basis. (R. at 14). However, the Board has not adequately explained such inaccuracies, nor has it shown how the alleged inaccuracies affect the issue of whether it is as likely as not that the Appellant’s current diagnoses are linked to his in-service injuries, the account of which the Board has already accepted as credible. Therefore, the Board has failed to demonstrate how the preponderance of the evidence shows that the Appellant’s cervical and lumbar spine conditions are not etiologically related to his active service duty. The Board has conceded the credibility of the Appellant’s statements regarding his in-service jeep accident. These same statements formed the bases for several private medical opinions linking the Appellant’s current degenerative diagnoses to his in-service accident. There is no evidence in the records of an alternative etiology for the Appellant’s current conditions. The conditions are consistent in time and place with the in-service injuries. Therefore, it is the Appellant’s submission that he has

satisfied the criteria for service connection for his DJD and DDD of the cervical spine, and for service connection for his DDD of the lumbar spine. The supportive opinions of Appellant's treating physicians as well as that of the VA examiner put the evidence in relative equipoise which warrants the application of the benefit-of-the-doubt rule. 38 CFR § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

The Board has disagreed with Appellant's assertion that his currently diagnosed degenerative diseases are related to the neck and low back pain he experienced in service. (R. at 11). The Board cites *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009) and *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), to conclude that Appellant did not have the requisite medical knowledge or specialized training to provide an opinion as to the etiology of his current disabilities. (R. at 11). Appellant submits that the Board has incorrectly applied the principles in *Davidson* and *Jandreau*, because, rather than providing an expert opinion on the nexus, he was merely describing or commenting on the pain that he suffered in service and the pain he currently experiences. Under the principle in *Jandreau*, Appellant is competent to do so. It must be noted that the pain, as described by Appellant, were documented in the records of his private physicians who were able to confirm the link between his in-service injury and his current diagnoses.

Finally, the Board is not permitted to discount or reject the opinion of a private physician, simply because the private physician did not, or there is no evidence that the private physician did, review a veteran's claims file or his service medical records. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 301 (2008). In its 2015 decision, the Board noted that the opinions of June 2012, June 2013, July 2014, and February 2015, did not indicate that the physicians reviewed the veteran's claims file. (R. at 12). The Board went on to note that the June 2012 opinion of Dr. S.M. referred to a history of closed head trauma as a result of his in-service vehicle accident, but that there was no evidence in the record of such trauma. (*Ibid*). The implication being that, had Dr. S. M. reviewed Appellant's claims file, he would not have referred to a closed head injury as it was not in the records. The doctor relied on the account of the injury as reported by Appellant to form his opinion. From all accounts, Appellant's evidence was found to be credible. Hence, Dr. S.M., (or any other treating physician) did not require the claims file to form a nexus opinion regarding his spine. As it was held in *Nieves-Rodriguez v. Peake* "[T]he claims file is not a magical or talismanic set of documents, but rather a tool to assist VA examiners to become familiar with the facts necessary to form an expert opinion to assist the adjudicator in making a decision on a claim". (*Ibid* at 303). In Appellant's case, he recounted the facts, and the claims file would not have assisted his private physician(s) in forming an expert opinion. It must be re-

emphasized here, that the VA found Appellant's account of the in-service accident competent and credible. (R. at 11).

CONCLUSION

For the reasons given above, Appellant believes that he is entitled to service connection for his neck and low back conditions. The Board erred in its assessment of the medical evidence; it made findings of facts which are clearly erroneous; and it has otherwise relied on its own, unsubstantiated medical opinion to deny service connection. The Appellant respectfully requests that the Board's decision be reversed.

Respectfully Submitted,

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